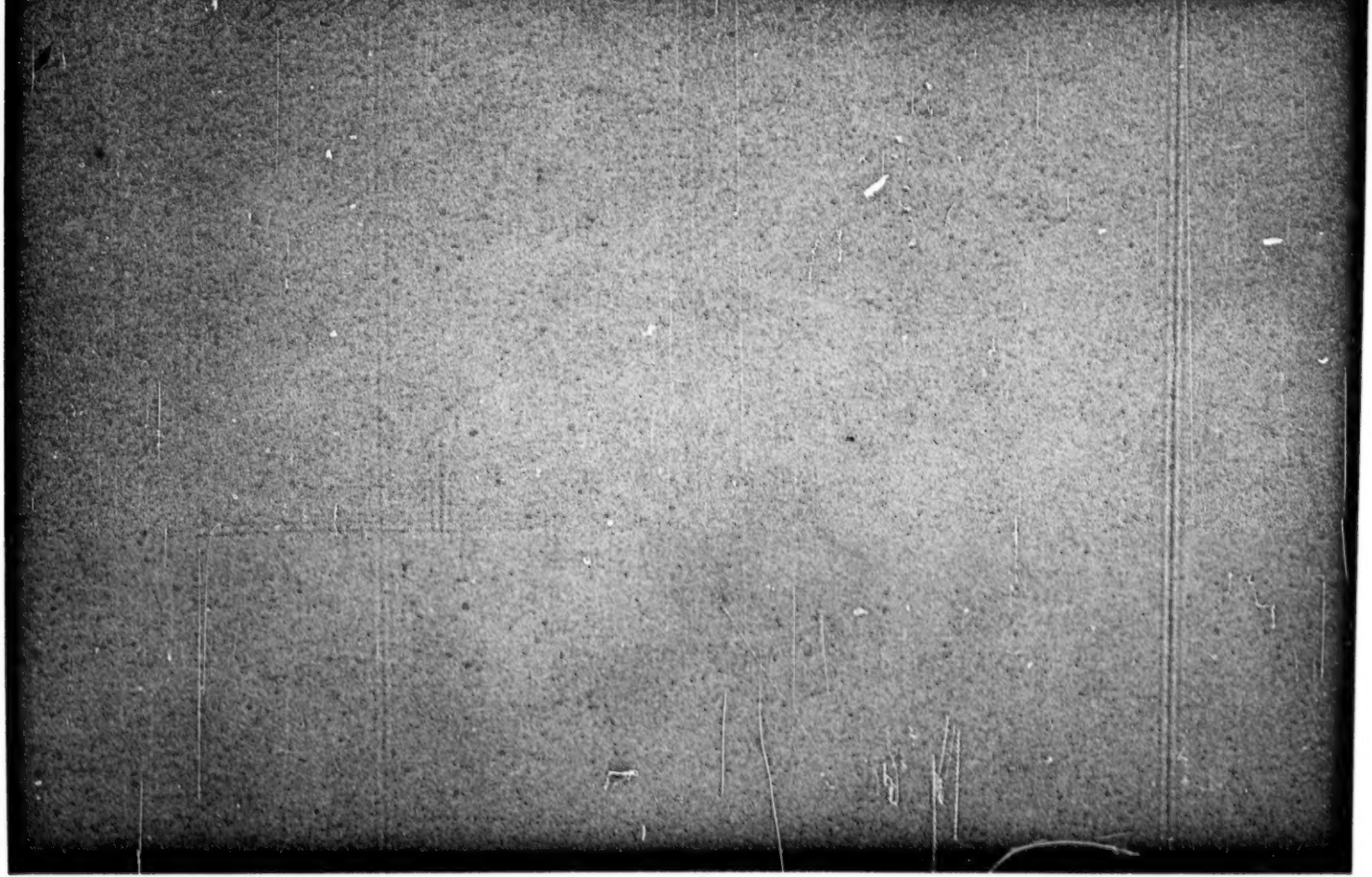

SUPREME CO
FILED
NOV 8 1974
MICHAEL RODAK, JR. CLERK

Supreme Court Of The United States

OCTOBER TERM, 1973

No. 74-1

JOHN A. CARDIN, PETITIONER

versus

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Attorney for Petitioner

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY 40207

Supreme Court Of The United States

OCTOBER TERM, 1973

No. 74-1

JOHN A. CARDIN, *Petitioner*

versus

COMMONWEALTH OF KENTUCKY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

I

THE ENTRY OF TESTIMONY CONCERNING OTHER CRIMES COMMITTED BY THE PETITIONER WAS A VIOLATION OF HIS RIGHT TO CONFRONTATION.

The Sixth Amendment guarantee of the Right to Confrontation of witnesses is a fundamental right applied to the states through the Fourteenth Amendment. *Pointer* v. *Texas,* 385 U.S. 400 (1965). In that case the Court held that the record of the pretrial hearing could not be used in the trial if there was not adequate opportunity for cross-examination of the witnesses at that hearing. The rationale for the ruling was that such cross-examination was necessary to the rudiments of a fair trial. The Court noted that this Right to Confrontation was *not* met just because an attorney was given a mere opportunity to cross-examine:

> "The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given *a complete and adequate opportunity to cross-examine.*" 380 U.S. at p. 407 (Emphasis added)

In the case here the petitioner was, of course, represented by counsel. However, counsel was deprived of that "complete and adequate" opportunity to cross-examine the witnesses that the *Pointer* decision requires.

On three separate occasions statements relating to other crimes allegedly committed by the petitioner were made from the witness stand by the chief prosecuting witness. Although petitioner continuously objected to such testimony, it was nonetheless allowed to stand without even an admonition to the jury. Petitioner's counsel obviously couldn't ask questions in cross-examination pertaining to those matters, therefore effectively depriving the petitioner the ability to completely and adequately cross-examine the witness.

This evidence of other crimes was not separately admissable as a matter of law, yet the jury was allowed to consider such evidence without even an admonition. Even with an admonition it would have been extremely difficult for the jury to overlook this testimony in considering their verdict. As Justice Frankfurter stated in dissent in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957):

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should

not consider but which they cannot put out of their minds." 352 U.S. at p. 24.

This dissent was later cited with approval in the landmark decision of *Jackson* v. *Denno*, 378 U.S. 368 (1964).

In another case, the Court has condemned restrictions on the scope of cross-examination. In *Smith* v. *Illinois*, 390 U.S. 129 (1968), the defendant's counsel was not allowed to ask the prosecution's chief witness on cross-examination his correct name and address. The Court found this restriction on the defendant's ability to cross-examine reversible error.

In the instant case, the jury heard evidence relating to two other crimes from the key prosecution witness. Such evidence was referred to on three separate occasions in front of the jury. It is petitioner's contention that the inability, indeed the impossibility, of counsel on cross-examination to completely and adequately confront this witness was a violation of his Sixth Amendment rights. Under *Pointer*, the fact of confrontation must be coupled with the reality of confrontation in order for cross-examination to be complete and adequate under the Sixth Amendment. Such was not the case here.

II

THE FAILURE OF THE TRIAL JUDGE TO GRANT THE PETITIONER'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE RESPONDENT'S CASE SHIFTED THE BURDEN OF PROOF TO THE PETITIONER IN VIOLATION OF HIS PRESUMPTION OF INNOCENCE.

The petitioner was charged in one count of the indictment with knowingly receiving stolen property in

the form of a 1970 Chevrolet truck. In order for the respondent to sustain the charge, it was necessary that it be shown that the truck was, in fact, stolen at the time petitioner received it. The evidence on this point presented by the respondent consisted of, at best, a circumstantial inference that it was stolen or the subject of a larceny at the time petitioner received it. The respondent presented evidence that petitioner was attempting to alter the body of the truck. The rental agreement covering the truck with a third party was also referred to though not entered into evidence. This agreement showed that the truck was legally in possession of a third party at the time petitioner was arrested. There had been no report filed by the rental agency concerning this vehicle being stolen.

Thus, the respondent was able to assert the stolen nature of the vehicle merely by having the jury assume that petitioner's possession of it had to have been the result of larcenous activity by either him or the third party lessee. Under Kentucky law, there is a rebuttable presumption that one in possession of stolen goods knew they were stolen. The situation here is one step short of this presumption since the respondent asked the jury to assume first of all that the automobile was stolen in order to put into effect the presumption itself. Such a tactic shifted the burden of proof to the petitioner to prove that the vehicle was *not* stolen: to have required the petitioner to shoulder this burden of proof in addition to rebutting the ensuing legal presumption detracted from his constitutional presumption of innocence that was petitioner's throughout the trial.

The Kentucky Court of Appeals acknowledged explicitly the inferential basis used by the respondent to

establish an essential element of the offense when considering this case on appeal. The Court then contradicted itself by asserting that the evidence supported the verdict. Such evidence supports the verdict only if one assumes that the inference, which was purely circumstantial, was itself valid. The validity of the inference is not at issue here; rather, it is the tactical and strategical effect of the use of evidence creating a mere inference that is contested. Tactically, it forced the petitioner to prove that the vehicle was not stolen—a burden obviously more difficult to sustain than disproving that it was stolen. Strategically, it detracted from the presumption of innocence of petitioner that attached to each element of the crime.

The failure of the trial judge to direct a verdict at the close of the respondent's case thus required the petitioner to assume the burden of proof in refuting an essential element of the offense. It is clear that the burden of proof always rests with the prosecution in a criminal case, and this Court has viewed attempts to shift this burden with disfavor. In *Cool* v. *United States*, 409 U.S. 100 (1972), this Court held that the use of an instruction relating to reliability of an accomplice's testimony was erroneous. This was so because it ". . . had the effect of *substantially reducing* the Government's burden of proof." 409 U.S. at p. 104 (Emphasis added). The Court condemned this as detracting from the presumption of innocence:

> "Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his *innocence* beyond a reasonable doubt."

> "Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed and remanded . . ." 409 U.S. at p. 104.

In the case here, the failure to sustain the motion for a directed verdict clearly substantially reduced the respondent's burden of proof. The effect of this reduction was obviously to require the petitioner to establish his innocence rather than disprove his guilt. In such a situation the petitioner respectfully contends that his due process right to a fair trial was denied.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Attorney for Petitioner

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.